

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

74-2356

To be signed by
DAVID A. CUTLER

**United States Court of Appeals
FOR THE SECOND CIRCUIT**
Docket No. 74-2356

UNITED STATES OF AMERICA,

Appellee

PAUL IAN CHALOFF,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

VERSUS THE UNITED STATES OF AMERICA

PAUL J. CUTLER,
United States Attorney for the
Southern District of New York,
Attorney for the United States

DAVID A. CUTLER,
JOHN J. KENNEY,
Lawrence E. Felt,
Assistant United States Attorneys
of Counsel



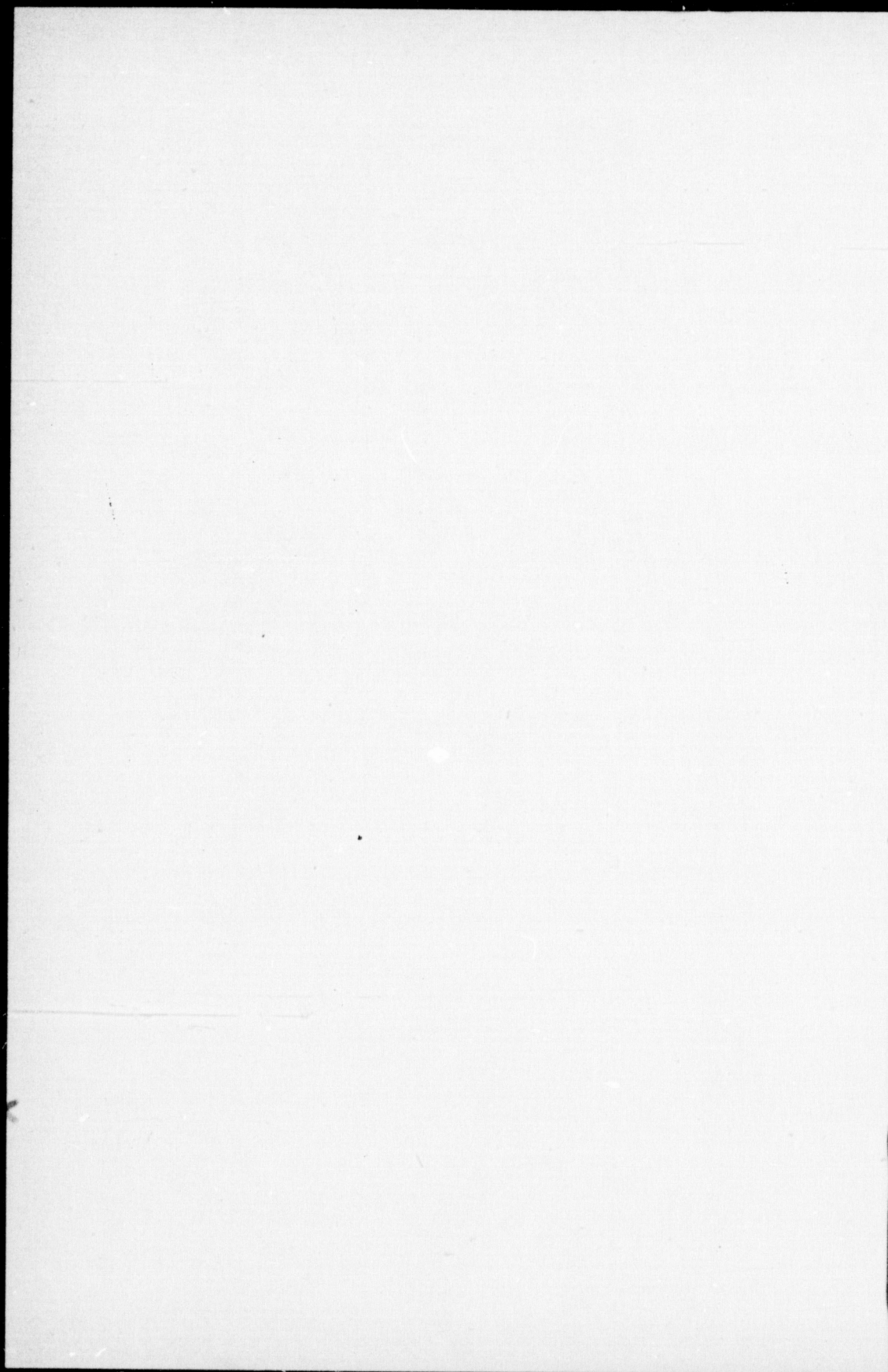


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
The Government's Case	2
The Defense Case	8

ARGUMENT:

POINT I—The evidence was sufficient to support the jury's verdict	11
POINT II—The trial court properly admitted the suitcase containing 50 pounds of hashish which was found open and in plain view in Chaleff's apartment	14
CONCLUSION	19

TABLE OF CASES

<i>Chapman v. California</i> , 386 U.S. 18 (1967)	18
<i>Coolidge v. New Hampshire</i> , 403 U.S. 443 (1971)	16
<i>Dorman v. United States</i> , 435 F.2d 385 (D.C. Cir. 1970) (<i>en banc</i>)	18
<i>Glasser v. United States</i> , 315 U.S. 60 (1942)	13
<i>United States v. Allied Stevedoring Corp.</i> , 241 F.2d 925 (2d Cir.), <i>cert. denied</i> , 353 U.S. 984 (1957)	14
<i>United States v. Arcuri</i> , 405 F.2d 691 (2d Cir. 1968), <i>cert. denied</i> , 395 U.S. 913 (1969)	11
<i>United States v. Artieri</i> , 491 F.2d 440 (2d Cir. 1974)	17
<i>United States v. Blair</i> , 366 F. Supp. 1036 (S.D.N.Y. 1973)	12, 17
<i>United States v. DeAlesandro</i> , 361 F.2d 694 (2d Cir.), <i>cert. denied</i> , 385 U.S. 842 (1966)	14

	PAGE
<i>United States v. Floyd</i> , 496 F.2d 982 (2d Cir. 1974)	2
<i>United States v. Ganter</i> , 436 F.2d 364 (7th Cir. 1970)	17
<i>United States v. Gonzalez</i> , 482 F.2d 223 (2d Cir. 1973)	17
<i>United States v. Gottfried</i> , 165 F.2d 360 (2d Cir.), cert. denied, 333 U.S. 860 (1948)	17
<i>United States v. Joly</i> , 493 F.2d 672 (2d Cir. 1974)	14
<i>United States v. Pui Kan Lam</i> , 483 F.2d 1202 (2d Cir. 1973)	11, 13, 14
<i>United States v. Mapp</i> , 476 F.2d 67 (2d Cir. 1973)	17
<i>United States v. McCarthy</i> , 473 F.2d 300 (2d Cir. 1972)	13
<i>United States v. McConney</i> , 329 F.2d 467 (2d Cir. 1964)	14
<i>United States v. Sisca</i> , 503 F.2d 1337 (2d Cir. 1974)	14
<i>United States v. Smolin</i> , 182 F.2d 782 (2d Cir. 1950),	14
<i>United States v. Taylor</i> , 464 F.2d 240 (2d Cir. 1972)	13
<i>United States v. Terrell</i> , 474 F.2d 872 (2d Cir. 1973)	14
<i>United States v. Titus</i> , 445 F.2d 577 (2d Cir.), cert. denied, 404 U.S. 957 (1971)	17
<i>United States v. Tramunti</i> , 500 F.2d 1334 (2d Cir. 1974)	11
<i>United States v. Wisniewski</i> , 478 F.2d 274 (2d Cir. 1973)	14

STATUTES AND OTHER AUTHORITIES CITED

Title 21, United States Code, Section 878(3)	17
Rule 52(a), Federal Rules of Criminal Procedure	18
3 Wright, Federal Practice and Procedure § 675, p. 130 (1969)	17

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 74-2356

UNITED STATES OF AMERICA,

Appellee,

—v.—

PAUL IAN CHALEFF,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Paul Ian Chaleff appeals from a judgment of conviction entered on September 23, 1974, in the United States District Court for the Southern District of New York, after a five-day trial before the Honorable Charles M. Metzner, United States District Judge, and a jury.

Indictment 73 Cr. 297,* was filed on April 6, 1973, charged Chaleff, Steve Abelman, Peter Gilman Axelrod, Michael Reeves Floyd, James Krell, Harris Damon Lesavoy, Steven Irwin Liebermann and Stephen H. Miller, in two counts, with violations of the federal controlled substances laws, Title 21, United States Code, Sections 812, 841 and

* This indictment superseded Indictment 72 Cr. 1284, filed on November 20, 1972.

846.* Count One charged the defendants with conspiracy to distribute and possess with intent to distribute 1,500 pounds of a hashish-like substance containing tetrahydrocannabinol and marihuana (hereinafter "hashish"). Count Two charged each defendant with the possession of 1099 pounds of hashish with the intent to distribute.

Chaleff's second trial commenced on July 17, 1974, and on July 24 the jury returned a verdict of not guilty on Count One and guilty on Count Two. On September 23, 1974, Judge Metzner sentenced Chaleff to six months imprisonment to be followed by a term of special parole of two years. He is at liberty pending this appeal.

Statement of Facts

The Government's Case

On October 30th, 1972, James Hicks, an informant, introduced Gerald H. Hochman, a federal narcotics agent acting in an undercover capacity, to James Krell at Krell's home, 4601 New Brunswick Avenue, Piscataway, New Jersey. Hochman told Krell that he wanted to purchase

* All the other defendants have been convicted of these charges. Abelman pleaded guilty to both counts on April 9, 1973, and, on June 8, 1973, imposition of his sentence was suspended, and he was placed on probation for a period of five years. Krell pleaded guilty to both counts on April 11, 1973, and on May 30, 1973, was sentenced to two years imprisonment and two years special parole. In April, 1973, Axelrod, Chaleff, Floyd, Lesavoy, Liebermann and Miller were tried before Judge Metzner and a jury. The jury could not reach a verdict as to Chaleff, but the other five were convicted, and were sentenced on June 8, 1973. Axelrod, Lesavoy, and Liebermann each received three years imprisonment and two years special parole. Floyd received one year imprisonment and two years special parole. Miller received six months imprisonment and two years special parole. Only Floyd, Lesavoy, and Miller appealed, and their convictions were affirmed. *United States v. Floyd*, 496 F.2d 982 (2d Cir. 1974).

500 pounds of hashish. Krell said that he had access to 800 pounds of hashish which was "stashed" on the west side of Manhattan under the control of Michael and Peter,* and that he would contact his people to arrange the final terms. (Tr. 33-4, 119.)

After Hochman and Hicks left that evening, Krell called Michael Floyd, and, the following day, October 31st, 1972, he and Floyd went to an apartment on Riverside Drive in Manhattan where they met Peter Axelrod and Steven Liebermann. Axelrod and Krell went into a separate room where they discussed the terms and details of the sale of hashish to Hochman. (Tr. 119-21.)

Shortly after midnight on November 1st, 1972, Hochman called Krell at home. Krell said that the price would be \$450 a pound and that his salesman wanted to sell only 100 pounds initially. Krell also told Hochman that the hashish was stored in different parts of town in three or four "banks." Hochman agreed to purchase the 100 pounds and said he would call Krell the next day. (Tr. 34-6, 121; GX 2.),

At about 1:00 P.M. on November 1st, 1972, Krell and Floyd met with Hochman at the Holiday Inn on 59th Street, between Ninth and Tenth Avenues in Manhattan. Once in Hochman's hotel room, it quickly became clear that Hochman wanted to buy several hundred pounds of hashish while, according to Floyd, Peter Axelrod would only agree to an initial sale of 10 pounds. (Tr. 39-40, 121.)

Hochman showed Krell and Floyd that he had the money for a large deal. Agent Rottinger, also acting undercover, brought \$100,000 in cash to the hotel room. But, since the parties were "stalemated" as to the quantity of the initial delivery, Floyd made two phone calls to Axelrod

* Subsequently shown to be the defendants Floyd and Axelrod.

in an attempt to resolve the impasse. Hochman sought unsuccessfully to arrange a meeting between Axelrod and himself, and then finally agreed to take an initial shipment of 50 pounds. Krell went uptown for the hashish. (Tr. 41-43, 122-23.)

Krell drove to Axelrod's Riverside Drive apartment with "the two Steves" (Abelman and Miller) whom he had hired to be his drivers, and met with Axelrod and Liebermann. After Axelrod placed a phone call to Hochman from a public telephone booth down the street, Krell, Miller, Abelman, Liebermann and Axelrod all drove to Columbus Avenue and 71st Street. Axelrod got out of the car and walked around the corner onto Columbus Avenue, where Chaleff resided at No. 229, between 70th and 71st Streets. Axelrod returned in 10 minutes carrying a plaid suitcase * containing 50 pounds of hashish which he and Krell placed in the trunk of the car. Axelrod and Liebermann left saying they would take a taxi back to the apartment. (Tr. 123-25, 180-81; GX 1.)

Krell, Miller, and Abelman returned to the Holiday Inn. Krell entered the hotel while Miller and Abelman stayed in the car. Krell found Hochman in the hotel restaurant and was told that Floyd would meet them in Hochman's room. They went up to the room, but Floyd was not there. Krell went outside to look for Floyd and met him on the sidewalk. Floyd said that he was afraid "the place was hot, that there were agents around or police or somebody." Krell then called Hochman to tell him the deal was off for that day. (Tr. 43-4, 125-26.)

On November 6, 1972, Hochman again called Krell at home, starting a new series of negotiations. Between

* Liebermann was called as a defense witness and, on cross-examination, testified that this suitcase came from Chaleff's apartment. (Tr. 368.)

November 6th and 11th, there were a number of telephone calls back and forth between Hochman and Krell, Krell and Axelrod, and Axelrod and Hochman. Hochman also spoke with Abelman on November 7th. In that call, Abelman explained that:

"It's very mellow like—the reason it is this way—like people, everybody that is involved in it from our end are friends and have been friendly for years and years and years and they got the thing together

* * * * *

... There are about four people involved in getting it together and a—so they got it together out of friendship." (GX 3 at 4-5.)

Chaleff, Liebermann, Axelrod, and Lesavoy were the only individuals in the case who had been friendly "for years and years." (Tr. 163-65, 330, 336.) Then on November 10th, Hochman met with Axelrod and had dinner with him at a restaurant on East 86th Street in Manhattan. The culmination of this meeting was an agreement by Axelrod to sell 500 pounds of hashish to Hochman for \$225,000 at Krell's house in New Jersey the following day in three shipments of 50, 150 and 300 pounds. Hochman was to pay for each shipment as it arrived. (Tr. 53-6, 127-29, 134-35.)

The following morning, November 11, 1972, Krell called Axelrod and they discussed the mechanics of the transaction scheduled to take place that afternoon with Hochman. Krell told Axelrod that "Steven and Steven" (Abelman and Miller) were on their way to New York. Axelrod gave Krell a telephone number where Abelman and Miller could reach him. The number was 874-6727, which the agents determined to be the telephone number of Paul

Chaleff at 229 Columbus Avenue.* Then Axelrod told Krell to "forget that number" and said that "he could call here, it might be easier, I tell you what, have him call here." (Tr. 129-34, GX 5.)

Abelman brought the first shipment of 50 pounds of hashish to Krell's house where the "bricks" were placed on display in the basement. After Hochman arrived and saw the hashish, he persuaded Krell to enter into an arrangement whereby Hochman would call his "money man" to bring half the money, and Krell would call Axelrod to deliver the next installment of hashish on the representation that he had already seen Hochman's money. As soon as Hochman's "money man" arrived, Krell and Abelman were arrested. (Tr. 60-2, 135-36, GX 4.)

Meanwhile, Axelrod, Lesavoy, and Miller drove to Chaleff's apartment at 229 Columbus Avenue. Axelrod and Lesavoy went upstairs, while Miller remained in the car. When Axelrod and Lesavoy came out, each carrying a 50-pound suitcase of hashish, Miller opened the trunk of the car. All three were then arrested. Seconds later, Liebermann emerged from the apartment building also carrying 50 pounds of hashish in a suitcase, and he was placed under arrest as well. (Tr. 177-9, GX 6, GX 7, GX 8.)

The arresting agents obtained from Liebermann a key to Chaleff's apartment at 229 Columbus Avenue, and, after first knocking and receiving no response, used it to enter the apartment to look for additional people who were involved in the case. On the way out, Agent Reilly noticed on the floor in a small room or "walk-in closet" an open

* The agents obtained this information as a result of a wire-tap on Krell's telephone, authorized by a New Jersey state court on November 9, 1972.

suitcase full of what appeared to be hashish.* He also noticed a strong aroma that appeared to be coming from the hashish. Agent Reilly described the apartment as a "railroad flat." Going down a long corridor, there was a kitchen, the small room where the hashish was found, a living room and a bedroom. (Tr. 179-82, 208; GX 9).**

Meanwhile, over at 270 Riverside Drive, other agents were admitted to Axelrod's apartment where they found Chaleff and three girls. Then they proceeded through the apartment looking for Axelrod under the mistaken belief that he was there. In one of the bedrooms, they noticed an open suitcase full of hashish. At this point, Chaleff and a girl named Jones were placed under arrest. (Tr. 225-8, GX 15.) Pursuant to a warrant, a search of Liebermann's apartment at 290 West 12th Street in New York City was later conducted which revealed ten additional suitcases containing hashish. (Tr. 184, 192-4, GX 14-GX 14I.) The total weight of all the seizures of hashish made on November 11, 1972 was approximately 1,100 pounds. (Tr. 185.)

Subsequent to his arrest, Chaleff was brought to the United States Courthouse where he was interviewed by Assistant United States Attorney Franklin Velie in the presence of his lawyer, Mr. Stephen Russo. At this inter-

* Several additional suitcases of hashish, not in plain view, were also discovered by Agent Reilly, but this evidence was suppressed. However, Liebermann, who was called as defense witness, testified on cross-examination that 400 to 500 pounds of hashish contained in six to eight suitcases had been stored at Chaleff's apartment from mid-October to November 11th. (Tr. 337.)

** Chaleff testified on cross-examination that he must have been in the small room where the six to eight suitcases of hashish were stored during the period of October 30 to November 11, 1972. Chaleff testified that he could smell the hashish in the courtroom, but he did not recall the same odor in his apartment. (Tr. 430-31, 436.)

view, Chaleff gave his address as 2284 Bronx Park East. (GX 17, GX 18.*) However, Chaleff's name appeared on the door and the mailbox at 229 Columbus Avenue, and a telephone in his name was installed there on September 19, 1968. Further, his passport showed his address as being 229 Columbus Avenue. (Tr. 31, 180-1, GX 19.)**

Finally, the Government submitted expert testimony that the "hashish" which had been seized in fact contained tetrahydrocannabinol and marijuana, both of which are controlled substances. (Tr. 185, 191-93, 248-50, 253-54, GX 10-GX 13.)

The Defense Case

The defense sought to establish that Chaleff was not a member of the conspiracy and indeed was not even aware of the existence of the 500 pounds of hashish stored in his apartment. To support his defense, Chaleff relied heavily on the testimony of three witnesses—Steven Liebermann, Michael Floyd, and himself.

Liebermann, who admitted his participation in the conspiracy, testified that the hashish had been brought to Chaleff's apartment without Chaleff's knowledge or consent, and that Chaleff was not a member of the business and did not receive any money from the sale of drugs. The hashish in Chaleff's apartment was wrapped in plastic garbage bags to contain the smell and placed in suitcases which were concealed under some blankets and quilts on a loft bed in the small room. (Tr. 313-30.)

On cross-examination, Liebermann testified that he had known Chaleff for 14 years, and that he, Chaleff, and Axel-

* Mr. Russo stipulated to Mr. Velie's testimony at the trial.

** Chaleff testified on cross-examination that, when he was appointed an instructor at CCNY in 1970, he gave 229 Columbus Avenue as his address. (Tr. 421.)

rod were very close friends. They all went to CCNY, where Liebermann and Axelrod sold drugs. Liebermann said that Chaleff might have smoked marijuana at parties, but asserted that he neither sold drugs to Chaleff nor ever told Chaleff that he was selling drugs. (Tr. 330-34).

After a year of graduate school, Liebermann traveled extensively in Europe and Africa for a year. He returned to New York in July, 1972 and took an apartment on West 12th Street. From July to November, 1972, Liebermann did no work at all other than selling drugs. He continued his close relationship with Chaleff and saw Chaleff at least once or twice a week. Yet he allegedly never told Chaleff how he supported himself or that he sold drugs. (Tr. 332, 334-36).

In October, 1972, Liebermann kept a 2-1/2 room apartment at 290 West 12th Street, Axelrod had a 4-bedroom apartment at 270 Riverside Drive, and Lesavoy also had an apartment on West 12th Street consisting of two rooms and a kitchen. Liebermann said he had obtained his apartment to store the hashish. Liebermann testified that he did not want to involve an innocent person in the conspiracy. Nevertheless, he admitted that in mid-October, 1972, while Chaleff was in Europe, he moved six to eight suitcases containing 500 of the 1200 pounds of hashish he had at his own apartment to Chaleff's apartment because he, Axelrod, and Lesavoy were "known drug dealers."* He claimed that he planned to deal out of Chaleff's apartment in order to make the drugs in his own apartment "less vulnerable." (Tr. 337-42, 368.)

When asked to explain the storing of 500 pounds of hashish at Chaleff's apartment and his plans to deal out of Chaleff's apartment in view of his professed desire to

* Liebermann later testified that he was incorrect in this statement. (Tr. 366.)

avoid the implication of an innocent person in the conspiracy, Liebermann responded that the object was to send all the hashish from Chaleff's apartment to New Jersey. This purported explanation plainly left much to be desired when Liebermann was forced to admit that he had no knowledge or expectation of the New Jersey deal when he brought the hashish to Chaleff's apartment, that it was very difficult to sell the hashish, and that one of his partners was able to deal five or ten pounds only once or twice. (Tr. 342-3, 356-9, 364.)

Liebermann further testified that the reason why the hashish remained in Chaleff's apartment after Chaleff returned from Europe was that it took elaborate preparations to get Chaleff out of the apartment in order to remove the hashish without his knowledge. Yet, Liebermann admitted that there had been no problems in removing part of the cache on November 1 and on November 11, and that he knew that Chaleff would be at work on some of the days between November 1 and 11. (Tr. 359-61.)

Michael Floyd, who also admitted his involvement in the conspiracy, testified that he had never seen or heard of Chaleff before the arrests. (Tr. 398-402.)

Chaleff took the witness stand in his own defense and testified that during the period of October 30th to November 11th, 1972, he was very busy with his work and did not spend much time at his apartment at 229 Columbus Avenue. A number of people had keys to the apartment and used it "sort of as a meeting place." Chaleff claimed that he had no idea there was hashish in his apartment, or in Axelrod's apartment. He allegedly never agreed with anyone to distribute or possess hashish, and never received anything for the use of his apartment. (Tr. 405-19.)

Nian Fish testified that she had lived with Chaleff at 229 Columbus Avenue for a substantial period of time up to July of 1972, and that she visited the apartment

two or three times a week thereafter. She said she was not aware of any drugs in the apartment, and never heard Chaleff discuss drugs with Axelrod or Liebermann. (Tr. 390-6.)

Chaleff also called five character witnesses (Tr. 444-59) and four of the agents who participated in the surveillance, arrests and seizures in the case (Tr. 275-310).

ARGUMENT

POINT I

The evidence was sufficient to support the jury's verdict.

Viewed in the light most favorable to the Government, the evidence clearly was sufficient to support the jury's verdict that Chaleff possessed the hashish with intent to distribute it, or aided and abetted such possession.

On its direct case, the Government established that 200 pounds of hashish had been stored at Chaleff's apartment at 229 Columbus Avenue, and proved through the defense witness Liebermann that an additional 200 to 300 pounds had been stored there as well.* Circumstantial proof that the apartment was Chaleff's and that he resided there was confirmed by Chaleff's admissions on the stand that he stayed at the apartment from October 30th to November 11th, 1972, and that he used the very room where the hashish was

* Once the defendant has put in a case, the sufficiency of the evidence must be determined from the entire record. *United States v. Tramunti*, 500 F.2d 1334, 1338 (2d Cir. 1974); *United States v. Pui Kan Lam*, 483 F.2d 1202, 1208 n.7 (2d Cir. 1973); *United States v. Arcuri*, 405 F.2d 691, 695 n.7 (2d Cir. 1968), cert. denied, 395 U.S. 913 (1969).

stored during that time. Thus, it was undisputed that Chaleff possessed the hashish in the sense that the hashish was stored in the apartment and that he had, at the least, joint control of the premises.

The only remaining issue then is whether Chaleff knowingly and wilfully permitted the hashish to be stashed in his apartment. On this score, there was ample evidence from which the jury could infer that Chaleff had the requisite state of mind. The apartment was small, consisting only of a living room, bedroom, kitchen, and the small room or "walk-in closet" where the hashish was stored. The hashish weighed 400-500 pounds and was contained in six to eight suitcases. Moreover, it had an unmistakable odor which Chaleff was able to identify in the courtroom.* Since Chaleff admittedly used the "walk-in closet" when the hashish was stored there, the huge bulk and penetrating odor of the hashish alone was sufficient to warrant a finding that Chaleff was aware of its existence. *Cf. United States v. Blair*, 366 F. Supp. 1036, 1040 (S.D.N.Y. 1973).

Chaleff's relationship with the others involved in the hashish transaction is further evidence from which the jury could infer guilty knowledge and intent.** Chaleff, Lieberman, and Axelrod were close friends for 14 years. They all attended CCNY, and Lieberman and Axelrod sold drugs to other students at that time. Chaleff smoked marijuana occasionally. Abelman explained to Hochman that the reason why the deal would be "very mellow" was that the

* Chaleff suggests that the hashish in the apartment was "carefully wrapped" while the hashish in the courtroom was "left exposed" (Brief at 27). To the contrary, the hashish in the courtroom was left in the suitcases just as it had been in the apartment (Tr. 193-96, 217-18).

** Given the huge amount of the hashish stored in his apartment, Chaleff could not possibly claim that it was for his own personal use. The quantity alone was sufficient to permit the inference that it was intended for distribution.

four people involved had been friendly "for years and years and years." The only four people in the case who had been friendly for years were Chaleff, Liebermann, Axelrod and Lesavoy.

Further, on November 1, 1972, when Hochman was to purchase 50 pounds of hashish, Axelrod obtained the hashish from Chaleff's apartment. And, on November 11, 1972, when Axelrod and Krell were discussing the mechanics of the 500-pound transaction scheduled to take place that afternoon, Axelrod initially said that Abelman and Miller should call him at Chaleff's apartment. Then, Axelrod said that "it might be easier" to have them call at his own apartment, and the person standing by at Axelrod's apartment that afternoon was Chaleff. Moreover, there was an open suitcase full of hashish as well as additional hashish, \$4,500 in cash, marijuana, and pills in plain view in the bedroom of Axelrod's apartment when Chaleff was present in the apartment.

Finally, when interviewed by an Assistant United States Attorney, Chaleff gave his parent's address as his residence. In view of the proof that Chaleff resided at 229 Columbus Avenue since 1968, the jury was entitled to consider Chaleff's false exculpatory statement as further evidence of his guilty consciousness.

While Chaleff relies on his own and Liebermann's testimony in attacking the sufficiency of the evidence, his arguments were rejected by the jury, and viewing the evidence most favorably to the Government, *Glasser v. United States*, 315 U.S. 60, 80 (1942), *United States v. McCarthy*, 473 F.2d 300, 302 (2d Cir. 1972), the jury's verdict is fully supported by the record. Chaleff's reliance on the lack of direct proof of his knowledge and participation is unavailing; the jury was entitled to rely entirely on circumstantial evidence. *United States v. Pui Kan Lam*, 483 F.2d 1202, 1208 (2d Cir. 1973); *Cf. United States v. Taylor*, 464 F.2d 240, 244 (2d Cir. 1972).

The jury could properly have inferred Chaleff's guilt from the evidence (1) that a huge quantity of hashish was stored in his small apartment during a period of almost two weeks while he was actually living there, *United States v. Wisniewski*, 478 F.2d 274, 279-80 (2d Cir. 1973); *Cf. United States v. Sisca*, 503 F.2d 1337, 1343 (2d Cir. 1974); *United States v. Terrell*, 474 F.2d 872, 875 (2d Cir. 1973); (2) that Chaleff had a close association with other proven participants and was standing by at the time of the drug transaction in Axelrod's apartment where still further contraband was in plain view, *United States v. Piu Kan Lam*, *supra* at 1208; (3) that the testimony of Chaleff and Liebermann regarding Chaleff's knowledge of the hashish in his apartment was unbelievable, *United States v. Joly*, 493 F.2d 672, 676-77 (2d Cir. 1974); *United States v. Allied Stevedoring Corp.*, 241 F.2d 925, 933 (2d Cir.), *cert. denied*, 353 U.S. 984 (1957); and (4) that Chaleff made the false exculpatory statement concerning his residence, *United States v. DeAlesandro*, 361 F.2d 694, 697-8 (2d Cir.), *cert. denied*, 385 U.S. 842 (1966); *United States v. McConney*, 329 F.2d 467, 470 (2d Cir. 1964); *United States v. Smolin*, 182 F.2d 782, 786 (2d Cir. 1950). The evidence was thus ample to support the jury's finding that Chaleff knowingly possessed the 500 pounds of hashish stored in his own apartment, and aided and abetted the felonious possession of the hashish stored in the apartments of his joint venturers, Axelrod and Liebermann, by making those 600 to 700 pounds "less vulnerable" to seizure.

POINT II

The trial court properly admitted the suitcase containing 50 pounds of hashish which was found open and in plain view in Chaleff's apartment.

On November 11, 1972, when Axelrod, Lesavoy and Miller were arrested on the street in front of Chaleff's apartment at 229 Columbus Avenue with two suitcases full of hashish, the arresting agents were surprised by the

emergence from the building of Liebermann carrying yet another suitcase full of hashish. After apprehending Liebermann and obtaining the key to Chaleff's apartment from him, the agents entered the apartment to arrest additional members of the hashish ring. While in the apartment, one of the agents spotted an open suitcase full of hashish in plain view on the floor.* Chaleff contends that this suitcase was improperly admitted into evidence. His argument is without merit.

Chaleff's motion to suppress pursuant to Rule 41(e), Federal Rules of Criminal Procedure, made prior to the first trial, was denied after a three-day hearing.** In substance, the District Court found that, following the arrests in front of 229 Columbus Avenue, the agents were justified in immediately entering Chaleff's apartment for the purpose of arresting other persons who were involved in the transaction, and that the hashish was lawfully seized upon being inadvertently discovered in plain view. (Op. 6-7.)

As the result of Agent Hochman's undercover work, the Government had reasonable cause to believe that it was on the trail of a group of persons who could easily produce large quantities of hashish. On November 11th, 1972, the date of the planned delivery of the 500 pounds, some persons involved in the scheme had been identified, although not all were known by name. Even at this point, the Government could not be sure it knew the full scope of the conspiracy. (Op. 1-2.)

About mid-day on the 11th of November, Axelrod was observed leaving his apartment at 270 Riverside Drive with

* After this discovery, the agents conducted a general search of the apartment and found an additional five suitcases containing 250 pounds of hashish. This evidence was suppressed.

** The District Court's opinion, dated April 18, 1973, is referred to herein as "Op."

a suitcase containing 50 pounds of hashish and placing the suitcase in a car driven by Abelman. This suitcase was the first installment of the planned 500 pound delivery to New Jersey. Subsequently, Axelrod, Miller and an unidentified man* left Axelrod's apartment and were driven by Miller to 229 Columbus Avenue. Axelrod and Lesavoy went into 229 Columbus Avenue and came out a few minutes later carrying two suitcases, each containing 50 pounds of hashish. As they approached Miller who was opening the trunk of the car, all three were arrested. Seconds later, a third man came out of 229 Columbus Avenue carrying a suitcase which also contained 50 pounds of hashish. When he saw the arrests in progress, he dropped the suitcase and fled. He was immediately apprehended and identified as Steven Liebermann. (Op. 2-4.)

Several agents then went to Chaleff's apartment and, after knocking and receiving no answer, entered with a key obtained from Liebermann. Agent Reilly walked through the apartment to the farthest point and found no one. On his way back, he observed on the floor of a small room a suitcase which was open and which contained what appeared to be hashish. He seized it. The District Court found that this seizure was the result of an inadvertent discovery, and thus admitted it into evidence. *Coolidge v. New Hampshire*, 403 U.S. 443, 464-473 (1971).

Contrary to Chaleff's contention that the agents' entry into the apartment was predicated only on their suspicion that the apartment was being used as a "stash" (Brief at 32), the District Court expressly found that the agents were justified in believing that there were other persons in Chaleff's apartment who were involved in the transaction and that they entered the apartment for the purpose

* Identified after arrest as Harris Lesavoy.

of arresting these persons (Op. 6-7). The findings of fact by the District Court must be accepted on appeal unless they are clearly erroneous. *United States v. Ganter*, 436 F.2d 364, 368 (7th Cir. 1970); *United States v. Gottfried*, 165 F.2d 360, 367 (2d Cir.), *cert. denied*, 333 U.S. 860 (1948); 3 Wright, Federal Practice and Procedure, § 675, p. 130 (1969). In view of the facts that the agents were dealing with a ring which apparently could produce hundreds of pounds of hashish from a stash at Chaleff's apartment, that they were surprised by the appearance of Lesavoy and Lieberman on November 11th and thus could not be sure of how many persons were involved in the ring, and that they learned through the wiretap earlier the same day that Axelrod could be reached at a telephone number which was subscribed to by Paul Chaleff at 229 Columbus Avenue, the District Court's finding that the agents entered the apartment for the purpose of arresting other members of the hashish ring is not "clearly erroneous." *

Having reasonable cause to believe that there were persons in Chaleff's apartment committing a crime, and having statutory authority to make arrests without warrant, the agents were fully justified in entering the apartment to make arrests. 21 U.S.C. § 878(3); *United States v. Artieri*, 491 F.2d 440, 442-43 (2d Cir. 1974); *United States v. Gonzalez*, 483 F.2d 223, 224-25 (2d Cir. 1973); See also *United States v. Mapp*, 476 F.2d 67, 73-4 (2d Cir. 1973); *United States v. Titus*, 445 F.2d 577, 578-79 (2d Cir.), *cert. denied*, 404 U.S. 957 (1971); *United States v. Blair*, *supra* at 1039.**

* The District Court's refusal to validate the entry for any other purpose is clear from its suppression of the additional 250 pounds of hashish which the agents seized in the apartment.

** To the extent that there are cases which appear to require a higher standard such as "exigent circumstances" to enter an apartment without a warrant, it should be noted that they in-

[Footnote continued on following page]

In any event, if any error were committed in admitting the one suitcase of hashish seized from Chaleff's apartment, it was harmless beyond a reasonable doubt. Rule 52(a), Federal Rules of Criminal Procedure; *Chapman v. California*, 386 U.S. 18 (1967). Viewing the evidence in the light most favorable to the Government, as this Court must on appeal, the three suitcases carried onto the street by Axelrod, Liebermann and Lesavoy clearly came from Chaleff's apartment. These suitcases together contained three times the amount of hashish as the one found in the apartment. They and their contents were all properly introduced in evidence, and Chaleff makes no claim to the contrary.

In addition, Liebermann, called as a defense witness, testified that there were six to eight suitcases containing 400 to 500 pounds of hashish in Chaleff's apartment at that time. In view of Liebermann's testimony, which was available to both sides, Chaleff's contention that the admission of the suitcase requires reversal of his conviction borders on the frivolous.

volve nighttime searches and sometimes forcible entry. *See, e.g., Dorman v. United States*, 435 F.2d 385 (D.C. Cir. 1970) (en banc). Since the entry here occurred during the middle of the day, it is unnecessary to reach the question of whether "exigent circumstances" were necessary to justify the entry without an arrest warrant.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

DAVID A. CUTNER,
JOHN J. KENNEY,
LAWRENCE S. FELD,
*Assistant United States Attorneys,
Of Counsel.*

AFFIDAVIT OF MAILING

STATE OF NEW YORK)

) ss.:

COUNTY OF NEW YORK)

DAVID A. COWEN being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 17TH day of JANUARY, 1975
he served 2 copies of the within brief by placing the
same in a properly postpaid franked envelope addressed:

JULIA P. HEIT, ESQ.
210 EAST 15TH STREET
NEW YORK, N.Y. 10003

And deponent further says that he sealed the said en-
velope and placed the same in the mail drop for mailing
at the United States Courthouse, Foley Square, Borough
of Manhattan, City of New York.

David A. Cowen

Sworn to before me this

17th day of January 1975
Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1976